No. 90-1464

FILED
MAR 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC., AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

v.

DOUG ROY, JR., MARSHA ROY, A MINOR, THROUGH HER GUARDIAN AD LITEM, DOUG ROY, JR., AND DOUG ROY, III, A MINOR, THROUGH HIS GUARDIAN AD LITEM, DOUG ROY, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The trial court, after verdict, weighed the evidence, found the jury's verdict contrary to its "overwhelming" weight, found further that the jury was "overwhelmed" by the emotion that "pervaded the case," and ordered a new trial under Federal Rule of Civil Procedure 59. The court of appeals weighed the evidence again, for itself, found that evidence was "substantially balanced" (it did not hear the evidence), found no "evidence" of jury sympathy (it did not see the jury), and reversed the new trial order. In so doing, the court of appeals vacated a second jury's verdict that agreed with the trial court.

This petition presents the following questions.

1. Some courts of appeal permit a trial court to weigh evidence and credibility, and to set aside verdicts the trial court finds against the great weight of the evidence, even though "substantial evidence" supports the verdict. Other courts of appeal forbid a trial court to weigh credibility, and prohibit a new trial order if there is "some support" for the jury verdict. Still others are somewhere in between.

Should the Court clarify the district court's power to grant new trials under Rule 59?

2. Some courts of appeal refuse to review new trial orders based on a trial court's finding that the verdict is against the weight of the evidence. Other courts of appeal reverse such orders only in "extraordinary" circumstances of "clear error." Still other courts of appeal give "strict scrutiny" to such new trial orders, reweighing the evidence for themselves.

Should the Court clarify the circuit court's scope of review of new trial motions?

PARTIES IN THE COURT OF APPEALS

All parties in the court below are identified in the caption of this petition. Petitioner Volkswagen of America is a wholly owned subsidiary of petitioner Volkswagenwerk Aktiengesellschaft. Volkswagenwerk Aktiengesellschaft's subsidiaries, other than wholly owned subsidiaries, are listed below:

Audi AG

VW-Gedas & Co. Projektmanagement OHG

Sociedad Espanola de Automobiles de Tourismo S.A.

Coordination Center Volkswagen SA

Europcar International S.A.

Autolatina Comercio Negocios e Participacoes Ltda

Volkswagen do Brazil S.A.

Autolatina Argentina S.A.

Shanghai-Volkswagen Automotive Company Ltd.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. ("Volkswagen"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 16, 1990, as amended on December 17, 1990.

That judgment and opinion reversed the trial court's grant of a new trial. The trial court had found that the

verdict was "against the great weight of the evidence" and "swayed by emotion and sympathy," and ordered a new trial to avert "a serious miscarriage of justice." The court of appeals, reading the cold record, substituted its view of the evidence for the view of the trial judge who saw and heard the evidence, live, and reversed. The court of appeals thus vacated the second jury's verdict in favor of defendants below, and reinstated the original jury verdict of $3 million in favor of plaintiffs below, Doug Roy, Jr., Marsha Roy, Shannon Roy and Doug Roy, III (the "Roys").

OPINIONS BELOW

The United States District Court's opinion granting a new trial is reported at 600 F. Supp. 653 and is reproduced as Appendix A. The court of appeals' opinion reversing the district court's grant of a new trial is reported at 896 F.2d 1174 and is reproduced as Appendix B. The court of appeals' order amending this opinion is reported at 920 F.2d 618 and is reproduced as Appendix C.

JURISDICTION

The court of appeals entered judgment on February 16, 1990. It denied a timely Petition for Rehearing and amended its earlier opinion on December 17, 1990. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Federal Rule of Civil Procedure 59(a), which provides in pertinent part:

Rule 59. New Trials; Amendment of Judgments (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

This diversity action arose out of a single-vehicle accident in 1982, when the Roys' 24-year old 1958 Volkswagen van rolled over. The Roys alleged that the rollover and subsequent fire were proximately caused by a design defect in their vehicle.[1]

A. The First Trial

Because of the gruesome injuries sustained in the accident, particularly by the plaintiffs' young son, Volkswagen sought a bifurcated trial to avoid prejudicing the jury's liability determination. The district court declined to bifurcate the trial. With liability and damage evidence both before it, the jury returned a $3 million verdict in the Roys' favor.

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[1] The accident occurred after plaintiffs' van developed a fuel-line problem, which Mr. Roy "fixed" himself. He removed the gas cap, inserted one end of a rubber hose into the open fuel tank, packed rags around the hose in the open filler nozzle, ran the hose along the outside of the van, and connected the other end of the hose to the fuel pump. When, driving the van, Mr. Roy swerved left and the van rolled, gasoline spilled and ignited, and the van caught fire.

1. The Liability Evidence

Liability turned on the cause of the rollover. This in turn hinged on where the van was when it started to roll. It was "essential to plaintiffs' case" that the vehicle began to roll on the smooth pavement of the highway, and did not trip on the soft gravel on the shoulder alongside of it. *Roy v. Volkswagen Aktiengesellschaft*, 600 F. Supp. 653, 655 (C.D. Cal. 1985) ("*Roy I*") (App. 5A).[2] Plaintiffs' theory was that Mr. Roy swerved left to avoid a dog, and that the van started its roll on the smooth pavement. *Roy I*, 600 F. Supp. at 654 (App. 5A). Volkswagen's theory was that Mr. Roy fell asleep at the wheel, let the van drift onto the unimproved shoulder of the highway and, when he woke up with a start, swerved left to try to return to the highway. The front wheels dug deeply into the soft dirt shoulder, which was two to three inches below the pavement, and the van "trip[ped]." *Roy I*, 600 F. Supp. at 654 (App. 5A).

Plaintiffs themselves could shed no light on this critical issue. Mr. Roy, who was driving, conceded "that he did not know whether the vehicle ever left the paved surface," or not. *Roy II*, 896 F.2d at 1178 (App. 16B). Thus, to support their theory, plaintiffs offered two "eyewitnesses," who claimed to have seen the van begin to roll

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[2] *See also* CT 290 (Judge Wilson's decision) (plaintiffs "never indicated in any way . . . that they could win if . . . Mr. Roy drove off the road"). It was undisputed that a vehicle that rolls when tripped is not defective. *Roy v. Volkswagen of America*, 896 F.2d 1174, 1178 (9th Cir. 1990) ("*Roy II*") (App. 16B) ("Both parties agree that the fact that a vehicle rolls after being tripped is not indicative of a design defect"); *Roy I*, 600 F. Supp. at 654-55 (App. 5A) ("Even plaintiffs' experts have admitted that the fact that a vehicle rolls after being tripped is no indication that the design of the vehicle is defective").

while still on the pavement. These "eyewitnesses," however, were some 2,000 feet (about the length of seven football fields) away from the accident. Indeed, as the court of appeals would later note, plaintiffs themselves "did not dispute" that their "eyewitnesses" could not see the road markings from their vantage point. *Roy II*, 896 F.2d at 1168 (App. 17B).

For its part, Volkswagen presented five separate categories of physical and testimonial proof, which both undermined the credibility of plaintiffs' "eyewitnesses" and independently established that the vehicle began to roll over only after it had left the road. The district court found this evidence so powerful that it refused a jury view of the accident scene as not "worth a trip." (RT 1717-20)[3]

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[3] Volkswagen's evidence was: (1) A surveyor who surveyed the terrain said that because of the road elevation and crown of the road surface, the eyewitnesses could not see the lane markings, road surface, or the gravel shoulder. (RT 1220-21) (2) Three policemen, who had stood where the two eyewitnesses had been, swore to exactly the same thing. (RT 1027-28, 1120-23, 980-82) (3) Videotapes taken at the scene "demonstrate[d] clearly that because of the nature of the terrain [those eyewitnesses] would have been unable to judge from their point of observation whether the van commenced its roll on the pavement or off on the shoulder." *Roy I*, 600 F. Supp. at 655 (App. 6A). (4) Photographs taken by the police "immediately after the accident" "clearly" showed the tracks of the van on the gravel, "precisely as defendants . . . contended." *Roy I*, 600 F. Supp. at 655 (App. 5A). (5) There were no marks on the highway or "physical evidence of any kind . . . to support plaintiffs' theory." *Roy I*, 600 F. Supp. at 655 (App. 6A); *see also* RT 1020-25.

2. The Damages Evidence

In contrast to their liability case, plaintiffs presented overwhelming and heartbreaking evidence of their injuries, centering on those sustained by their youngest child. The jurors saw "many graphic and explicit photographs" of little Doug Roy, III's burns, his resulting disfiguring scars and the many operations he had endured and would endure. *Roy I*, 600 F. Supp. at 655 (App. 6A). This presentation culminated as the boy was undressed before the jury on his doctor's knee to display his wounds. (RT 706-36) The jury returned a $3 million verdict in favor of the Roys.

B. The New Trial Order

Volkswagen moved for a new trial under Rule 59, and the district court granted the motion. The trial judge found the verdict contrary to the "great weight of the evidence" and that "emotion . . . pervaded the case" because of the jury's exposure to evidence of the little boy's "horrible" burns, and "obscure[d] the issue of liability." *Roy I*, 600 F. Supp. at 653, 655 (App. 2A, 6A).[4]

As to the cause of the accident, the trial court reviewed the evidence – the "eyewitnesses' " testimony, the police testimony, the surveyor testimony, the photographs, the videotapes and the physical evidence. The court judged that the "eyewitnesses" could not have seen what they said they saw in light of the undisputed physical facts at the scene of the accident, and that the "great weight of the evidence" defeated the Roys' theory. *Roy I*, 600 F. Supp at 654-55 (App. 5A-6A). P. 5, above.

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[4] The district court also found no design defect, but that finding is not at issue here.

As to sympathy, the trial judge determined, based on what he observed and felt in the courtroom, that "emotion . . . pervaded this case" and "overwhelmed the jury." The little boy's "horribly disfiguring scars" made "most difficult a dispassionate evaluation of the evidence." *Roy I*, 600 F. Supp. at 653, 655 (App. 2A, 6A). The court found the verdict "so contrary to common sense and the overwhelming weight of the evidence that [the district court] cannot in good conscience permit it to remain." *Roy I*, 600 F. Supp. at 653 (App. 2A). "[T]o allow the verdict to stand," the court concluded, "would constitute a serious miscarriage of justice." *Roy I*, 600 F. Supp. at 655 (App. 6A-7A).

C. The Second Trial

The second trial was tried before a new judge. He bifurcated the liability and damages issues, because he concluded that viewing the horrible injuries would likely sway the second jury with emotion and make it unable to render a fair decision. (II RT 5-7)

On essentially the same liability evidence, but without the emotionally wrenching display of the child's injuries, the second jury reached the same conclusion as the original trial judge, and unanimously returned a defense verdict.

D. The Court Of Appeals Reweighs The Evidence And Reverses

On appeal, the court of appeals decided the verdict "did not necessarily indicate that the jury's decision was born of sympathy" and reweighed the evidence itself, making credibility judgments although it had not

observed the witnesses or their demeanor, or even, apparently, seen the trial exhibits.[5] Based on its *de novo* assessments of sympathy, credibility, and weight, the court of appeals reversed the new trial order, vacated the second jury's verdict, and reinstated the first verdict.

As to sympathy, the court of appeals did not see the "horribly disfigured" child or the juror's reactions as he was undressed before them. Indeed, the court of appeals apparently did not even see any pictures of him (n.5, above). Nor did the court of appeals consider that the second jury, hearing that same evidence (without viewing the child's horrifying burns), returned a defense verdict. The court of appeals simply declared that there was no "evidence" of jury prejudice, so the jury was not "necessarily" unable to "put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated." *Roy II*, 896 F.2d at 1179 (App. 18B).[6]

As to the evidence, the court of appeals acknowledged that "the Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses." *Roy II*, 896 F.2d at 1178 (App. 17B). The

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[5] When the court of appeals issued its opinion, all the exhibits from the first trial were still in the district court clerk's office, and there was no record that they ever had been sent to the Ninth Circuit.

[6] The panel noted that the jury did not award punitive damages and that the award was in line with the medical evidence. But the award of millions of dollars in compensatory, rather than punitive, damages, did not show that the jury was dispassionate in considering evidence of liability. Indeed, the second jury's verdict – reached without the "graphic" evidence of the child's "horribly disfiguring scars" – showed the opposite. *Roy I*, 600 F.2d at 655, 653 (App. 6A, 2A).

court of appeals nonetheless chose to credit their testimony.[7] In so doing, the court of appeals disregarded the videotapes which the trial court had found "demonstrated clearly" plaintiffs' witnesses' unreliability (so much so that a jury view was unnecessary), and made no mention whatever of the physical evidence the trial court had found "thoroughly inconsistent" with plaintiffs' theory. *Roy I*, 600 F. Supp. at 655 (App. 5A-6A). Based on its reweighing of the evidence, the court of appeals found that each side "presented persuasive evidence," that the evidence was "substantially balanced," and that Volkswagen's evidence "did not . . . preponderate." *Roy II*, 896 F.2d at 1177, 1179 (App. 15B, 19B). The court of appeals concluded that the district court "abused its discretion in setting aside the jury verdict in the first trial and ordering a new trial." *Roy II*, 896 F.2d at 1179 (App. 19B).

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

A substantial conflict now exists among the circuits as to two issues that affect every civil trial in the federal courts: (1) the scope of a district court's power to grant new trials and (2) the standards applicable to appellate review of new trial orders. The conflict is starkly reflected in this case.

Rule 59 of the Federal Rules of Civil Procedure empowers the trial court to order a new trial after a jury

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[7] To support its decision to credit the testimony of the "eyewitnesses," the court of appeals relied on the changed testimony of one police witness from deposition to trial, *Roy II*, 896 F.2d at 1178 (App. 17B), even though it did not see the witness's demeanor and could not judge the effect, if any, of that attempted impeachment.

verdict. In this Court's words, the "authority to grant a new trial" has been "confided almost entirely" to the trial court's discretion. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). In particular, Rule 59 permits a trial court to grant a new trial when, in its view, the verdict is against the great weight of the evidence and results in a miscarriage of justice. Historically, the courts of appeals have recognized that the district court – which has heard the testimony and seen the witnesses – is best able to protect the interests of justice if accorded wide latitude to judge whether a new trial is appropriate. Orders granting a new trial were, traditionally, rarely reviewed, much less reversed; certainly they were not reversed based on the appellate courts' *de novo* assessment, and weighing, of facts based on a cold record.

In recent years, the courts of appeal have adopted conflicting rules on the powers of trial and appellate courts addressing new trial issues. Some courts of appeals have continued to protect the trial court's wide discretion, and have adhered to the traditional rule of extreme deference to trial court judgments on new trial orders, especially when the trial court's order is based on its assessment that the verdict is against the weight of the evidence. Other courts of appeals have departed from these rules in favor of a so-called "modern trend." These "revisionist" courts, while reciting traditional "abuse of discretion" language, have substantially narrowed the rights of trial courts to grant a new trial, and correspondingly have undertaken virtual *de novo* review. Those "revisionist" courts of appeals have restricted, or taken away, the trial court's right and duty to weigh the evidence and assess the credibility of witnesses upon a new

trial motion, and arrogated to the courts of appeals themselves virtually unreviewable discretion to weigh evidence, assess credibility and reinstate verdicts in cases they have not seen or heard. Some of these "revisionist" courts give stricter scrutiny to new trial orders based on the weight of the evidence than they give to new trial orders based on errors of law. And in this case, the court of appeals went beyond even the bounds of revisionist courts, finding no jury prejudice where it never saw the jury, the evidence, or felt the "emotion" that the trial court said "pervaded the case."

The "revisionist" cases turn the traditional roles of trial and appellate courts upside down, and give to courts of appeals an evidence weighing function no appellate court should have. The "trend" is troublesome. In the last decade, the number of reversals of new trial orders appears to have increased dramatically, especially in cases where the trial court allowed a new trial on grounds that the verdict was against the weight of evidence. The standards vary from circuit to circuit, and from case to case in some circuits. Thus, trial courts in some circuits have rights that trial courts in other circuits do not; and in circuits where the rule is elusive, no trial court knows what discretion it may exercise when it believes it sees a miscarriage of justice. Litigants in turn are left to guess whether a second trial is real or a meaningless exercise.

This Court's guidance is needed to secure a uniform rule on an issue that touches every case tried in the United States district courts. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 700 (1982) (certiorari granted to resolve conflict on application of federal rule); *Hanna v. Plummer*, 380 U.S. 460, 462-63 (1965) (granting certiorari "[b]ecause of the threat

to the goal of uniformity of federal procedure").[8] We ask the Court to grant review.

II. THE NINTH CIRCUIT'S DECISION REFLECTS A CONFLICT AMONG THE CIRCUITS ABOUT THE SCOPE OF THE DISTRICT COURTS' DISCRETION TO ORDER A NEW TRIAL, AND THE APPELLATE COURTS' POWER OF REVIEW.

A. This Court's Teachings: Trial Courts Are Best Equipped To Rule Based On The Evidence, And Appellate Courts Should Not Second-Guess Them.

This court has never addressed the scope of a trial court's power to order a new trial under Rule 59, or the

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[8] *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits on the appealability question" as to certain district court decisions); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"); *Barrett v. United States*, 423 U.S. 212, 215 (1976) (certiorari granted because of the importance of the issue and because the court of appeals' decision "appeared to have overtones of conflict" with another circuit's decision); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977) (certiorari granted where the circuits "have been far from uniform in their treatment of this issue" and certain circuits had taken positions "which appear inconsistent with" the view of other circuits); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of a circuit conflict "and the need for a uniform rule on the point"); *Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as having an intracircuit conflict); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict").

scope of the court of appeals' review of such an order. Over the years, however, the Court has expressed its views generally on new trial orders.

Nearly sixty years ago, this Court observed that new trial orders based on the trial court's assessment of the evidence are not reviewable.

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions. . . . The rule precludes likewise a review of such action by a circuit court of appeals.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933). Since then the Court has addressed new trial issues from time to time, and has repeatedly stressed that the trial court, which sees a trial as it unfolds, observes the witnesses and hears the evidence, is far better equipped to decide new trial issues than an appellate court, which sees only a cold record. In this Court's words, the trial court "has a feel of the case that no appellate printed transcript can impart":

> Determination of whether a new trial should be granted . . . calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947) (holding when JNOV reversed, and trial court has not addressed new trial motion, remand required to give trial court opportunity to address new trial issue). Accordingly, an appellate court's scope of review, if any,

is very limited: "the authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (holding mandamus inappropriate to review grant of new trial) (emphasis added). Thus, where a new trial has been ordered based on the trial court's review of facts, the only issue is whether some evidence supports what the trial court did; if so, the new trial decision is affirmed.

> [I]t is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

United States v. Johnson, 327 U.S. 106, 111-12 (1946) (new trial order in criminal case). *See also* 6A J. Moore, *Moore's Federal Practice* ¶ 59.15[3] at 59-309-10 ("The rule of [*Johnson*] seems applicable to motions for new trials in civil actions.").

B. There Is Conflict Among The Circuits On The Rights And Limits Of The Trial And Appellate Courts In Ruling On And Reviewing New Trial Motions.

Traditionally, the courts of appeals have followed this Court's description of the proper roles of trial and appellate courts. In the last decade or so, however, the courts of appeals have diverged in the rules applied to trial and appellate courts addressing the new trial issue. Some circuits, and some cases within circuits, continue to adhere to traditional rules of deference to trial court

assessments of the evidence, and continue to give them little or no appellate scrutiny. Other circuits, and other cases within circuits, have begun a "modern" – or, more accurately, revisionist – trend. *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 178 (1st Cir. 1988). These "revisionist" courts recite the traditional "abuse of discretion" rule, but give it a completely different meaning. They restrict the rights of trial judges to assess the evidence and credibility, and expand the court of appeals' review of the trial judge's evidentiary and credibility conclusions.

The result is conflict among some circuits, and a hodge-podge of standards within others. As a result, a new trial order affirmed in one circuit will be reversed in another, or even in another case in the same circuit.

1. The Conflict On The Power Of Trial Courts To Order New Trials.

a. The Traditional Rule: Trial Courts Can Weigh Evidence And Credibility, Set Aside Verdicts Supported By Substantial Evidence, And Must Do So To Prevent A Miscarriage Of Justice.

Trial courts have a unique "feel of the case," *Cone*, above, 330 U.S. at 216, and are in the best position to judge whether the evidence supports a jury verdict. *See, e.g., Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 991 (1st Cir. 1978) (trial court in "far better position" than appellate court to assess credibility and conflicting testimony); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111, 1116 (5th Cir. 1980) (in affirming trial court's granting of a new trial, appellate court "give[s] great deference to the court's firsthand experience of the witnesses, their demeanor, and the context of the trial."); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985) (same); *Spanish Action Committee v. Chicago*, 766 F.2d

315, 321 (7th Cir. 1985) ("the trial judge, who heard the testimony and conducted all pretrial and trial proceedings, [is] uniquely situated to rule on a new trial motion").

Thus, courts of appeals that adhere to the traditional view[9] hold that trial courts can and should weigh evidence and credibility when determining whether to grant a new trial. *See, e.g., Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990) ("For purposes of ruling on [a] motion for new trial, the district court was free to reject [incredible witness'] testimony"); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985) (on new trial motion district court is "free" to "assay the comparative weight of the evidence pro and con"); *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) ("The trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner"). Indeed, on motion for new trial, the district court's weighing of evidence and credibility "is not a discretionary task, but a duty." *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987). *See also Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) ("the district judge had the right, and indeed the duty, to weigh the evidence as he saw it. . . . ").

A district court may, under the traditional rule, set aside a jury's verdict that is against the great weight of the evidence, even if the verdict is supported by "substantial evidence." *Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); *Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196, 198 (4th Cir.

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[9] The Second and Fourth Circuits consistently adhere to the traditional approach. The First, Seventh, Ninth and Tenth Circuits adhere to it often but not always. The Fifth Circuit follows it occasionally.

1987); *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 886 (1st Cir. 1978); *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir. 1978). The trial court's right and duty to weigh evidence is central to its power to correct a miscarriage of justice. The correction of a miscarriage of justice does not usurp the jury's role, but is an "integral part of trial by jury":

> [The trial court] does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. . . . If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Landes, 833 F.2d at 1371-72 (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 48-49 (1973)). *See also Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196 (4th Cir. 1987) ("the exercise of this power is not in derogation of the right to trial by jury, but is one of the historic safeguards of that right") (*quoting Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941)).

b. The Revisionist Rule: Trial Courts May Not Weigh Credibility, And May Not Set Aside Jury Verdicts Supported By Substantial Evidence.

Circuit courts following the revisionist trend – the Third, Sixth, Eighth, Eleventh and D.C. Circuits, and sometimes the Fifth Circuit – have adopted far more restrictive rules.

Courts applying the "traditional" rule permit trial courts to weigh the witnesses' credibility. P. 16, above.

Revisionist courts often (but not always) hold just the opposite: "A dispute over credibility will not justify a new trial." *Consumers' Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986) (*citing Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978)); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) ("It is the function of the jury as the traditional finder of the facts, *and not the court*, to weigh conflicting evidence and inferences, and determine the credibility of witnesses") (emphasis added) (citation omitted); *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir. 1983) (on motion for new trial "[t]he trial court may not usurp the functions of a jury. The jury weighs the evidence and credibility of witnesses"); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985) ("The choice between the two stories was essentially a credibility determination for the jury rather than a weight of the evidence issue"). Some of the revisionist cases cite JNOV cases as the source of the rule. *See, e.g., Narcisse*, 620 F.2d at 548 (*quoting Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (*following Tennant*); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523-24 (6th Cir. 1990) (*citing Tennant*).

Courts applying the traditional rule permit trial courts to order new trials when they judge the verdict is against the great weight of the evidence, even where substantial evidence supports the jury verdict. Pp. 16-17, above. Revisionist courts hold just the opposite: "[A]s long as there is *some support* for the jury's decision," the trial court cannot order a new trial. *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir.

1987) (emphasis added). *See also Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (conditional new trial order reversed where there was "significant evidentiary basis for the jury's verdict"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 647 (D.C. Cir. 1988) (reversing new trial order where "there was substantial evidence" supporting jury verdict); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) (new trial order reversed where jury's first verdict "*clearly within* the universe of possible awards which are supported by the evidence") (*quoting Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (emphasis in original)).

Thus, the circuits disagree on the scope of a trial court's power in deciding whether to grant a new trial.

2. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders.

There is a corresponding split among the courts of appeals on the scope of appellate courts' review of new trial orders. Traditional courts that recognize the trial court's power to weigh evidence and credibility, and to set aside verdicts supported by substantial evidence, also recognize the appellate courts' inability to weigh the evidence *de novo;* their scope of review is very narrow. In contrast, the revisionist courts that circumscribe the trial court's power expand their own scrutiny to virtual *de novo* review of the facts.

a. The Traditional Rule: Appellate Courts Are Ill-Equipped To Weigh Evidence And Credibility, And Should Not Do It.

Courts adhering to the traditional approach give extremely limited review to new trial orders. The court of

appeals will review a new trial order only in "exceptional circumstances." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941); *see also Forrester v. White*, 846 F.2d 29, 31 (7th Cir. 1988) (*quoting Spanish Action Committee v. Chicago*, 766 F.2d 315, 321 (7th Cir. 1985) (court of appeals will reverse decision on new trial motion only in "exceptional circumstances.").

Because the trial judge has a unique "feel of the case" (pp. 13, 15, above), "appellate review of a district court's order for a new trial is limited," and "the trial judge's grant or denial of a new trial will not be overturned 'except where exceptional circumstances show a clear abuse of discretion.' " *Forrester v. White*, 846 F.2d 29, 31 (7th Cir. 1988) (*quoting Spanish Action Committee v. Chicago*, 766 F.2d 315, 321 (7th Cir. 1985)). *See also Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 168 (4th Cir. 1985) ("[T]he granting or refusing of a new trial . . . is not reviewable on appeal, save in the most exceptional circumstances") (citations omitted); *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989) (same); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111, 1115-16 (5th Cir. 1980) (review of new trial order "severely limited").

Specifically, in reviewing new trial orders based on the weight of the evidence, the court of appeals traditionally "may not weigh evidence or assess the credibility of the witnesses." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987). *Accord Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988). Rather, the court of appeals reviews the district court's decision only for "clear error." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985); *Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983). *See also Anderson v.*

Bessemer City, 470 U.S. 564, 573-74 (1985) (defining "clear error" on review of court findings of fact: "[i]f the district court's account of the evidence is plausible . . . court of appeals may not reverse").

Indeed, where a new trial is granted on the grounds it is contrary to the clear weight of the evidence, some circuit courts will not review that decision at all. "To the extent that a new trial is sought on the ground that a jury verdict was against the weight of the evidence," the Second Circuit has expressly "disclaimed the authority to review a ruling on such a motion." *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (affirming denial of new trial); *Roberts v. Consolidated Rail Corp.*, 893 F.2d 21, 26 (2d Cir. 1989) ("a trial court order granting or denying a motion for a new trial on grounds that the verdict is against the weight of the evidence is not reviewable on appeal"); *Portman v. American Home Prods. Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) (same). *See also Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941) ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions.").

b. The Revisionist Rule: Circuit Courts Give The Closest Scrutiny To New Trial Orders Based On Weight Of The Evidence.

In contrast to the "traditional rule" circuits, the revisionist circuits arrogate to themselves an expansive power of review. Far from deferring to trial court fact assessments, or refusing to review them altogether as the Second Circuit does, courts applying the revisionist rule rigorously review new trial orders based on the weight of the evidence.

The revisionist courts do not regard the trial court's check on the weight of the evidence as "an integral part of trial by jury" as the "traditional rule" circuits do (p. 17, above). Rather, the revisionist circuits regard the trial court's new trial power as "intruding upon the jury's function and affecting a litigant's Seventh Amendment rights." *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). *Accord Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

The revisionist courts thus give "gradations of scrutiny" to new trial orders, depending on whether the new trial was granted or denied, and if granted, on the grounds for it. *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1503-04 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). *Accord McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988).

Ironically, where the district court orders a new trial for "legal error" in the course of the trial, some revisionist courts give little review and "the trial court's decision will ordinarily be affirmed." *McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988).

Where the district court orders a new trial because "confusing testimony and events created a potential for injustice," the revisionist court of appeals also "will ordinarily . . . affirm[]." *McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988). For even the revisionist courts recognize that the "trial judge who is actually present at the trial, is best able to determine whether the proceeding has been 'contaminated,' " such as by "prejudicial conduct or pernicious behavior." *McWhorter v. Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). *See also Cruthirds v. RCI, Inc.*, 624 F.2d 632, 635 (5th Cir. 1980) ("great latitude in the trial court's authority is especially appropriate when the motion cites some pernicious error

in the conduct of the trial. Then the trial court occupies the best vantage from which to estimate the prejudicial impact of the error on the jury.").

The revisionist courts, however, give no such respect to the trial court's first-hand experience with the evidence. Instead, they reserve the strictest scrutiny for new trial orders based on the weight of the evidence – which the appellate courts are least able to judge. *See, e.g., C.J. Ard v. Southwest Forest Industries,* 849 F.2d 517, 520 (11th Cir. 1988) ("stringent" standard of review applied when "district court grants a motion for a new trial based on the weight of the evidence"); *Rosenfield v. Wellington Leisure Prods.,* 827 F.2d 1493, 1498 (11th Cir. 1987) ("we . . . strictly scrutinize orders which *grant* new trials, where the basis for the order is that the verdict is against the weight of the evidence") (emphasis in original); *Watts v. Great Atlantic and Pacific Tea Co., Inc.,* 842 F.2d 307, 311 (11th Cir. 1988) (review "rigorous if the motion is granted rather than denied, and if the basis for the motion was . . . the weight of the evidence"); *Evers v. Equifax, Inc.,* 650 F.2d 793, 796-97 (5th Cir. 1981) ("A somewhat broader review applies to an order granting a new trial as opposed to an order denying such a motion, and the greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict is against the weight of the evidence"); *Conway v. Chemical Leaman Tank Lines, Inc.,* 610 F.2d 360, 363 (5th Cir. 1980) (applying "closest scrutiny of the evidence permissible").[10]

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[10] Some revisionist courts also recognize "gradations in the strictness of [their] review in those instances where the issues are highly complex, being more strict in [their] review when the issues are simple and the outcome largely dependent

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In reviewing these new trial orders "strictly" and "rigorously," the revisionist courts of appeals assess the evidence themselves, and weigh it themselves to reach their own conclusion on whether the "great weight" supported the verdict. *See e.g., Cruthirds v. RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980) ("we must review the record carefully to make certain that the district court has not merely substituted its own judgment for that of the jury"); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (undertaking "thorough examination" of the evidence); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 365-66 (5th Cir. 1980) (reviewing evidence in great detail, and deciding "there *is* no great weight of the evidence in any direction") (emphasis in original); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987) (jury "was free to believe or disbelieve portions of testimony, and it could reasonably have chosen to believe plaintiff's evidence . . . "). In sum, the revisionist courts depart from this Court's teachings on the proper roles of trial and appellate courts. They adopt gradations of scrutiny that are just the opposite of what appellate courts generally do, and that squarely conflict with what traditional circuits do.

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upon the credibility of witnesses." *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1503-04 (11th Cir. 1985); *See also Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960); *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). Also, where the trial court grants a new trial based on "a combination of factors, which could have caused the jury to reach a possibly erroneous verdict," some revisionist courts of appeal may allow "wide discretion." *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1504 (11th Cir. 1985).

C. This Case: The Conflict Within The Ninth Circuit.

This case puts the conflict in stark relief. The Ninth Circuit has ordinarily adhered to the traditional rules. But the Ninth Circuit spurned those rules in this case in favor of the revisionist approach – virtual *de novo* review of the trial court's weighing of evidence. As to the jury prejudice issue, the court of appeals went beyond even the revisionist cases; even the revisionist cases say the appellate courts cannot effectively reassess that. The result is way out of line, and highlights the need for this Court's attention to the rules that permitted it.

1. The Ninth Circuit's History Of Applying The Traditional Rules.

The weight of Ninth Circuit authority follows the traditional rules on the duties and limits of trial and appellate courts. Thus, most Ninth Circuit cases hold that, in deciding a new trial motion, the district court need not view the evidence from the perspective most favorable to the nonmoving party, but may weigh the evidence and assess the credibility of the witnesses. *Air-Sea Forwarders, Inc. v. Air Asia, Co.*, 880 F. 2d 176, 190 (9th Cir. 1989) (*citing Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987), and *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978)). Indeed, it is the "right" and "duty" of the trial court to weigh the facts. *Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990); *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957). The district court may order a new trial when it finds the jury's verdict against the "great weight" of the evidence, even where "substantial evidence" supports the jury's verdict. *Landes*,

833 F.2d at 1371-72; *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

As to appellate review, the Ninth Circuit generally applies the traditional rule that the court of appeals may not reweigh the evidence or reassess the credibility of the witnesses. *See Landes*, 833 F.2d at 1372 (*citing Palmer Coking Coal Co. v. Director, Office of Worker's Compensation Programs*, 720 F.2d 1054, 1058 (9th Cir. 1983)). The Ninth Circuit expressly has held that it may only determine whether the trial court's finding that the verdict is against the great weight of the evidence is a clear abuse of discretion, or, put differently, a "clear error." *Air-Sea*, 880 F.2d at 190 (*citing Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985)); *Phoenix v. COM/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983).[11]

A different panel of the Ninth Circuit, without citing *Roy*, reaffirmed these traditional rules just six months ago, while the Petition for Rehearing in this case was pending. *Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

2. The Ninth Circuit's Departure From The Traditional Rules In This Case.

In this case, the court of appeals departed from the traditional rules, and instead applied revisionist

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[11] Although some cases recite that the Ninth Circuit applies a "stringent standard" when the new trial motion is based on the weight of the evidence, that Court also has said that the "stringent standard" is really just the same as the "great weight" standard. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).

standards like those in the Third, Sixth, Eighth, Eleventh and D.C. Circuits.

a. The Weight Of The Evidence.

The trial judge found the Roys' evidence unreliable and the jury's verdict against "the great weight of the evidence." Under the traditional rule, that decision was unassailable. After all, the district court simply determined that two people could not see whether a vehicle was on or off the pavement from 2,000 feet, or seven football field lengths, away. The trial court based that determination on the testimony of three policemen who were there; a surveyor who was also there; videotapes which clearly demonstrated it; and all the physical evidence available. There was ample evidence to support the trial court's decision. Therefore, under traditional rules, the district court's determination was not clear error and should have been affirmed. Pp. 15-17, 19-21, 25-26, above.

The court of appeals, however, reversed. The court disregarded the trial court's judgment that the eyewitnesses – the Roys' *only* evidence on the critical liability question – were unreliable and disregarded its judgment that the overwhelming weight of the evidence on that critical causation issue was against the Roys.[12] Instead,

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[12] Like many of the revisionist cases, the original opinion cited a JNOV case for the proposition that the trial court had no right to weigh evidence and credibility. *Roy II*, 896 F.2d at 1179 (*citing Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (*en banc*) (App. 19B). Volkswagen filed a Petition for Rehearing, pointing out the difference between JNOV standards and the Ninth Circuit's traditional new trial standards. In its order amending the decision and denying the petition, the Ninth Circuit deleted the JNOV case from the opinion, but did not change the reasoning or result that was based on it. *Roy v. Volkswagen of America, Inc.*, 920 F.2d 618, 618-619 (9th Cir. 1990) (App. 20C-21C).

like the revisionist courts, the court of appeals undertook to reweigh the evidence itself. It acknowledged that the Roys "did not dispute" that their eyewitnesses could not see the road markings, but nonetheless concluded that the witnesses' statements as to the van's position on the road were believable, based on the court of appeals' own view of the evidence. *Roy II*, 896 F.2d at 1178 (App. 17B). Pp. 8-9, above. The court of appeals thus concluded that the Roys had presented "persuasive" evidence, that Volkswagen's evidence "did not preponderate," that the evidence was "substantially balanced," and held the district court's contrary judgment to be an abuse of discretion. *Roy II*, 896 F.2d at 1177, 1179 (App. 15B, 19B).

b. Jury Prejudice.

On the jury prejudice issue, the court of appeals went even farther than the revisionist courts go. For even the revisionist courts recognize that the "trial judge who is actually present at the trial, is best able to determine whether the jury has been 'contaminated,' " such as by "prejudicial conduct or pernicious behavior." *McWhorter v. Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). Thus, they "hesitate to overturn the grant of a new trial based on such grounds." *Id. See also Watts v. Great Atlantic and Pacific Tea Co.*, 842 F.2d 307, 311 (11th Cir. 1988) (less scrutiny given to new trial orders based on "pernicious occurrences" such as "introduction of possibly inflammatory evidence"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646 (D.C. Cir. 1988) (where "confusing testimony and events created a potential for injustice," the court of appeals "will ordinarily . . . affirm[].").

Here, the court of appeals did not "hesitate" to substitute its views on sympathy for those of the trial court. The district court, who saw the child, the burns, and their

effect on the jury, judged that sympathy for the badly burned child "pervaded the case," "overwhelmed the jury," and "swayed" it. *Roy I*, 600 F. Supp. at 655 (App. 6A). The second jury's verdict confirmed that the district court's assessment was right. The court of appeals, which was in no position to second-guess that judgment, nonetheless found that there was "no evidence" that the jury did not "put aside its personal feelings." *Roy II*, 896 F.2d at 1179 (App. 18B). It judged (without ever hearing the case, seeing the evidence or observing the jury) that the record "[did] not necessarily indicate that the jury's decision was born of sympathy." *Roy II*, 896 F.2d at 1179 (App. 18B).

D. The Court Should Grant Review To Resolve The Conflict.

We submit that the revisionist new trial standards, developed in other circuits and applied in this case, are ill-advised. They violate this Court's teachings. Pp. 12-14, above. They turn rational standards of review upside down, making appellate courts strictly scrutinize questions of fact. They restrict the trial court's discretion "after all [the] rulings have been made and all the evidence has been evaluated," *Cone*, 330 U.S. at 216, to assess credibility, weigh evidence, and reconsider the propriety and effect of earlier discretionary rulings – such as the decisions here to deny a jury view and deny bifurcation – to avoid a "miscarriage of justice." They saddle courts of appeals with a virtually unreviewable evidence-weighing role ill-suited to any reviewing court. They obscure the difference between the standards for JNOV and new trial. And they send the wrong message to the bench and bar, chilling trial judges' exercise of their duty to remedy injustice and letting advocates get away with prejudicial

trial practices that become whitewashed by the printed record. In short, the revisionist rules make no common sense.

But whatever the merits of the revisionist standards applied here, they conflict with the standards followed in other circuits (and in other cases within the Ninth Circuit itself). The confusion alone is reason to grant review.

This Court should remedy serious conflict, on a matter that touches every case tried in the federal courts.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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March 15, 1991

Doug ROY, Jr., etc., et al., Plaintiffs,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, A German Corporation, and Volkswagen of America, Inc., Defendants.

No. CV 83-5254-JWC.

United States District Court,
C.D. California.

Jan. 4, 1985.

David M. Harney, James J. Pagliuso, Los Angeles, Cal., for plaintiffs.

Robert E. King, Bakersfield, Cal., Michael A. Zuk, Los Angeles, Cal., for defendants.

MEMORANDUM OPINION

CURTIS, District Judge.

This court has before it defendants' motion to set aside the jury's verdict in the above entitled case, awarding plaintiffs, collectively, the sum of $3,000,000.00.

In this products liability case, the plaintiffs have sued the defendants for the defective design of a 1958 Volkswagen. The claim arises from an accident which occurred in February 1982, in which a 1958 Volkswagen van being driven by the plaintiff, Doug Roy, Jr., turned over and caught fire, seriously injuring Doug Roy, III, and to some extent his mother, father and sister.

According to the evidence, the Roy family was on a trip from their California home to home of relatives in Texas, a trip requiring several days travel. Along the way

some difficulty arose with respect to the fuel line. Whether it was because the line became clogged with dirt or for some other reason, insufficient fuel was reaching the engine to keep it running properly. In order to remedy this situation, Roy, Jr. removed the cap from the fuel fill pipe and inserted a rubber hose, surrounding it with rags and connecting the other end to the fuel pump, which apparently permitted the engine to perform satisfactorily.

While traveling on a two-lane highway at approximately 55 miles per hour, Roy made an abrupt turn to the left, causing the Volkswagen van to roll over, whereupon it caught fire causing the injuries alleged. This was indeed a tragic accident bringing an end to what had started out to be a happy family excursion. The record is replete with photographs of Roy, III, and the horribly disfiguring scars which his burns caused. It is one which indeed makes most difficult a dispassionate evaluation of the evidence upon a motion for a new trial, but after much careful consideration I can only conclude that the verdict is so contrary to common sense and the overwhelming weight of the evidence that I cannot in good conscience permit to remain.

The principal thrust of plaintiffs' case is their contention that the Volkswagen van was defectively designed, in that it had a tendency to roll over in circumstances such as those involved in this case. In the light of the voluminous technical testimony which was received in this case, it appears that the tendency of any vehicle to roll over is the result of the interaction of several factors; such as, the weight of the vehicle, the width of the tread, the center of gravity, the speed of the vehicle, the angle of

the turn, and the coefficient of friction between the tires and the pavement. The variation of any one of these factors materially affects the result. The experts further agreed that any vehicle will roll over given the right circumstances. From this, one must conclude that the mere fact that a vehicle rolls over during an accident does not necessarily mean that it is defective, nor does it mean that because one vehicle may have a greater tendency to turn over than another vehicle that the former is defective. The issue then before the jury was, did the fact that the Volkswagen van rolled over under the circumstances presented in this case indicate that the design of the van was defective.

A definition of a defective design was given to the jury in the court's instruction which read as follows:

> A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner, or if there is a risk of danger inherent in the design which outweighs the benefits of that design.

The evidence is uncontested that this particular 1958 Volkswagen van performed no differently than that of any other Volkswagen van of the same vintage, or appreciably different from any other Volkswagen van manufactured thereafter.*

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* Some claim was made that the swing axle which was later modified was a contributing factor, but the great weight of the evidence was to the contrary. Furthermore, it appears that the swing axle has been continued in use up until the present in some of the most expensive and well engineered cars on the market.

It is simply inconceivable that a vehicle of this type manufactured and sold by the millions over a period of twenty-five years, a vehicle which has met with phenomenol consumer acceptance can at this late date be found to have failed "to perform as safely as an ordinary consumer would expect."

The record is replete with video tape demonstrations which showed that the tendency of the Volkswagen van to roll is no greater than, if as great as, that of many American-made vans.

Admittedly, the center of gravity in a van is somewhat higher than that of a so-called "bug," but this was necessary in the design of the vehicle to accomplish the purposes for which it was manufactured, and the acceptance and use of such a vehicle throughout the world for twenty-five years demonstrates beyond a shadow of a doubt that its usefulness outweighs any slight risk of danger which it causes.

In my view, the verdict which finds the Volkswagen van defectively designed cannot be allowed to stand in the face of the overwhelming evidence to the contrary. Any risk of rolling over which may exist is inherent in the design and is necessary in order to enable the vehicle to perform its intended purpose. The design permits it to be handled as safely and in some instances more safely than other vehicles of similar design which have found universal acceptance in the marketplace even today. The Volkswagen design has remained virtually the same for approximately twenty-five years, during which time it has met with overwhelming consumer acceptance

throughout the entire world. To find such a design defective defies common sense.

Another critical issue in this case concerns the circumstances causing the vehicle to roll. Plaintiffs contend that while traveling approximately 55 miles an hour, the driver turned abruptly to the left in order to avoid a dog, and that the vehicle started and ended its roll on the smooth pavement. In fact, the main burden of plaintiffs' contention is that a vehicle which will roll in an abrupt turn on a smooth pavement under these circumstances would be defective. The defendants, on the other hand, contend that the driver apparently fell asleep and permitted the van to gradually drift off to the right on to the improved shoulder and ultimately beyond on to the unimproved portion of the highway, and then upon suddenly awakening he turned abruptly to the left in an attempt to get back on the highway. In the process the front wheels dug deeply into the dirt, which ruts together with the edge of the pavement to cause the vehicle to trip. Even plaintiffs' experts have admitted that the fact that a vehicle rolls after being tripped is no indication that the design of the vehicle is defective. It is therefore essential to plaintiffs' case that the evidence established that the roll commenced on the smooth pavement. On this issue the evidence overwhelmingly supports the defendants' theory. The pictures taken by the Chief of Police immediately after the accident clearly show the tracks made by the van, traveling precisely as defendants have contended. Although plaintiff speculated that these tracks could have been made by a passing vehicle attempting to avoid the burning van, such a theory is thoroughly inconsistent with the physical evidence. Plaintiff relies on the

testimony of two eyewitnesses to support his theory. These witnesses testified that while traveling in the opposite direction some 2,000 feet from the point of the accident, they saw the van turn over and burst into flame while it was traveling on the paved portion of the highway. The accuracy of such testimony is open to question because of the distance from which they observed the accident, and the improbability of them making an accurate observation of such a minor detail when suddenly confronted with a shockingly dramatic, tragic event such as that which appeared before them. Furthermore, video tapes demonstrate clearly that because of the nature of the terrain they would have been unable to judge from their point of observation whether the van commenced its roll on the pavement or off on the shoulder. And, there was no physical evidence of any kind such as marks on the highway to support plaintiffs' theory.

I think one must conclude from the great weight of evidence in this case that the design of the Volkswagen van was not defective and that, in any event, the roll over here under the circumstances hereinabove outlined was not the result of a defective design.

Although the jury should have been aware of these facts and circumstances, they were obviously swayed by emotion and sympathy for the little boy, Roy, III, which was generated by the many graphic and explicit photographs depicting his original burns and the many operations which he was required to endure as well as those yet to come. It is my belief that the emotion which prevaded [sic] this case, and which makes this court's decision a most difficult one, overwhelmed the jury, obscuring the issue of liability. In my view, for these

reasons to allow the verdict to stand would constitute a serious miscarriage of justice. The motion to set aside the verdict and for a new trial is hereby granted.

Doug ROY, Jr., Marsha Roy; Shannon Roy, a minor, By and Through her guardian Ad Litem, Doug Roy, Jr.; Doug Roy, III, a minor, by and through his guardian Ad Litem, Doug Roy, Jr., Plaintiffs-Appellents,

v.

VOLKSWAGEN OF AMERICA, INC.; Volkswagenwerk Aktiengesellschaft, a German Corporation, Defendants-Appellees.

No. 87-6340.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 30, 1989.

Decided Feb. 16, 1990.

Barry R. Levy, Horitz and Levy, Encino, Cal., David M. Harney, Harney and Packer, Los Angeles, Cal., for plaintiffs-appellants.

Michael A. Zuk, Herzfeld and Rubin, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before HUG and CANBY, Circuit Judges, and David A. Ezra,* District Judge.

CANBY, Circuit Judge:

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* Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

I. BACKGROUND

A. *Nature of the Case*

This is a products liability action arising from a single-vehicle car accident involving a 1958 Volkswagen van designed and distributed by appellees Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. (collectively, "VW"). Appellants, the Roy family, were seriously injured when their 1958 VW van, driven by Doug Roy, Jr., rolled and caught fire. The Roys filed suit in the United States District Court against VW alleging a design defect in the van. The district court had jurisdiction under 28 U.S.C. § 1332.

A jury trial was held after the district court denied the Roys' motion to bifurcate the trial of liability and damages. The jury returned a unanimous verdict for the Roys in the amount of $3 million.[1] The jury assessed 60% of the fault to VW and 40% to Mr. Roy, finding that there was a defect in the design of the van and that the defect was a proximate cause of the injuries. The jury considered and refused an award of punitive damages.

Subsequently, the district court granted VW's motion to set aside the verdict and ordered a new trial. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F.Supp. 653 (C.D.Cal.1985). The Roys appealed this order, but we dismissed the appeal because the order was interlocutory

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[1] The award was allocated as follows: Doug Roy, Jr. received $50,000; his wife, Marsha Roy, $250,000; their daughter, Shannon Roy, $200,000; and their son, Doug Roy III, $2.5 million.

and, thus, not appealable. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).

On return to the district court,[2] the trial was bifurcated. The trial on liability resulted in a unanimous jury verdict for VW and judgment was entered accordingly. The Roys appeal the decisions in both trials, asserting that the jury verdict at the first trial was wrongly set aside and that the second trial was infected by various errors. Concluding that the district court erred in granting the new trial, we reverse and reinstate the original jury verdict for the Roys.

B. *Facts*

On August 14, 1982, the Roys embarked in their 1958 VW van on a family trip from their home in California to Texas. During the trip, the van experienced periodic mechanical problems related to the fuel line that caused the van to run roughly. Mr. Roy, who was experienced in repairing automobiles, replaced various parts hoping to remedy the problem. Though each repair initially seemed to make the van run well, the problem soon recurred.

At nightfall on August 16, 1982, the van again began to display symptoms of fuel deprivation and was losing speed. After examining the engine, Mr. Roy determined that the flow of fuel from the fuel line was restricted. Mr. Roy decided it best to make a temporary repair to the vehicle to allow the family to proceed to their destination where he could obtain the needed parts. He removed the

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[2] The Honorable Jesse W. Curtis presided at the first trial; The Honorable Stephen V. Wilson at the second.

cap from the fuel fill pipe, plugged the opening in the fuel line and connected a make-shift fuel line by running a hose from the fuel pump into the fuel tank through the filler neck. Then, he wrapped a rag tightly around the hose in the filler neck to create a seal. After Mr. Roy's temporary repair, the van ran smoothly until the time of the accident.

What happened next is somewhat unclear. At approximately 8:00 a.m. on August 17, 1982, Mr. Roy was driving east on Interstate 10 just outside of Sonora, Texas. At that location, Interstate 10 is a level road with two lanes going in each direction. There is a paved shoulder which drops two to three inches to an unpaved coliche surface. Mr. Roy recalls driving in the slow lane at approximately 50-55 miles per hour. Suddenly, for reasons hotly disputed by the parties, the van overturned and began to roll. During the roll, the van caught fire. Each of the Roys, especially Doug Roy III, suffered significant injuries and trauma as a result of the accident.

II. JURISDICTION

The judgment of the district court in the second trial is a final judgment and is appealable to this court under 28 U.S.C. § 1291. The interlocutory order granting the second trial is now subject to review. *See Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir.1981).

III. ANALYSIS

A. *Standard of Review*

"The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if 'the

verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.' " *Hanson v. Shell Oil Company*, 541 F.2d 1352, 1359 (9th Cir.1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977) (citing *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir.1957). While the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial "merely because it might have come to a different result from that reached by the jury." *Wilhelm v. Associated Container Transportation (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir.1981). We review an order granting or denying a motion for new trial for an abuse of discretion. *Air-Sea Forwarders, Inc. v. Air Asia Company Ltd.*, 880 F.2d 176, 190 (9th Cir.1989). Thus, if the jury's verdict is not clearly against the weight of the evidence, the trial court abuses its discretion in ordering a new trial. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1420 (9th Cir.1989).

B. *The District Court's Grant of a New Trial*

In granting a new trial, the district court ruled that the jury's verdict finding a design defect in the 1958 VW van was against the great weight of the evidence. *See Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F.Supp. 653, 655 (C.D.Cal.1985). We disagree.

The district court correctly instructed the jury at the first trial that:

> A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended and

> reasonably foreseeable manner, or if there is a risk of danger inherent in the design which outweighs the benefits of that design.

Barker v. Lull Engineering Co., 20 Cal.3d 413, 429-30, 432, 143 Cal.Rptr. 225, 235-38, 573 P.2d 443, 453-56 (1978). After hearing the evidence, the jury determined that the *Barker* test had been satisfied with respect to the VW van. The trial judge rejected this finding, relying heavily on the long use and popularity of the VW van. Though relevant, consumer acceptance alone does not insulate VW from a finding that its van is defectively designed. *See Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d 510, 518, 109 Cal.Rptr. 110, 115 (1973) (suspension system of the VW "bug", which enjoyed wide consumer acceptance, found defectively designed where car had propensity to roll over). Long use and popularity of the VW van therefore do not alone justify the granting of the new trial. We turn, then, to the evidence presented at the first trial concerning the design of the VW van and the circumstances surrounding the accident.

1. Evidence of Design Defect

The expert evidence presented at the first trial concerning the design of the VW van was extensive and contradictory. The Roys contended that the swing-axle suspension system employed in the 1958 VW van was unstable and defective. William P. Thomas, who directed the race car programs for the Chevrolet Division of General Motors from 1956 to 1970, testified that when the van is turned, the VW suspension caused the back of the van to rise up and the wheels to drop. This reaction is known as "jacking." The jacking exacerbated the high center of

gravity and narrow wheel base that makes a van inherently more unstable than other vehicles. Dr. Igor Paul, a tenured associate professor of mechanical engineering at the Massachusetts Institute of Technology, also testified that the van would jack when turned. Dr. Paul suggested that jacking made the van susceptible to rolling over under circumstances that would not have caused similar American vans to roll.

The Roy's also presented to the jury the results of a "bunji cord" test developed by Paul O'Shea to monitor the reaction of vehicles when turned sharply.[3] Mr. O'Shea's test showed that the VW van would roll when turned sharply at between 18.2 and 18.4 miles per hour,

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[3] In the Bunji Cord test, a cable is attached to the car and it is wrapped around a hub device affixed to the steering wheel; the cable then runs to a pulley on the passenger's side, then back into a box containing the bunji cords. A pin is then inserted to hold the bunji cords taut; a lanyard is attached to the car from a tow truck. The truck then pulls the driverless car, with its engine off and its gear in neutral, to a certain speed at which point the lanyard is released; the disengaging of the lanyard causes the pin holding the bunji cords to be released also. When the pin is released, the bunji cords retract, thereby turning the steering wheel far enough to impart certain fixed degrees of turn to the front wheels. *See Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d at 515 n. 4, 109 Cal.Rptr. at 113 n. 4. Mr. O'Shea used this procedure to test the stability of the VW "bug". The results of those tests were admitted in *Culpepper*, where the court concluded that the jury could properly have found that a vehicle is defective if it rolls over on a flat, smooth surface when it is travelling 50-55 miles per hour and turned 18 degrees. *Id.* at 518, 109 Cal.Rptr. at 115. Mr. O'Shea testified at trial in this case that his tests demonstrate that it is easier to roll a VW van than it is to roll the VW bug.

whereas a 1967 Chevrolet van would not roll under the same conditions.

Dr. Paul and Mr. O'Shea further testified that the 1958 VW van had a tendency to change abruptly from "understeer" to "oversteer." During an evasive maneuver, this tendency could cause the van to turn more sharply than the driver intended or expected, compounding the instability of the van.

VW's experts challenged the credibility and conclusions of the Roys' experts. Some testified that jacking and the change from understeer to oversteer did not make the van less stable. In fact, Edward Heitzman, an automotive test engineer, testified that several top sports cars are designed to change from understeer to oversteer at high G's and that this characteristic was helpful in an emergency. VW also showed the jury a videotape of tests it performed on its own van and comparable American vans. These tests indicated that the VW van was no less stable than other vans on the market. In short, each side presented persuasive evidence in support of its position.

2. Was the Design Defect a Proximate Cause of the Accident?

Not only was the existence of a design defect at issue in this trial; the parties also disputed whether the alleged defect caused the accident. Again, the evidence was contradictory. Appellants contended that the driver, Mr. Roy, was traveling at approximately 55 miles per hour when he turned sharply to the left to avoid a dog, causing the van to roll. They claimed that the van never left the pavement and that any vehicle that would roll on a

smooth pavement under those circumstances did so as the result of a design defect. Mr. Roy and two eye witnesses, Wade Fitzgerald and Jerry Jardee, all testified that the van never left the pavement.

VW painted a different picture. It contended that Mr. Roy fell asleep while driving and drifted onto the unimproved portion of the highway. When he awoke, he turned abruptly to the left to return to the road. The combination of the ruts created by the wheels digging into the dirt and the edge of the pavement tripped[4] the van. Both parties agree that the fact that a vehicle rolls after being tripped is not indicative of a design defect.

VW introduced evidence to impugn the testimony of the Roys' witnesses concerning where the roll began. They cited testimony by Mr. Roy indicating that he did not know whether the vehicle ever left the paved surface. Further, Carr Thomson, a professional surveyor and licensed civil engineer in the State of Texas, testified that, from their distant position in an oncoming lane, Mr. Fitzgerald and Mr. Jardee could not have observed whether the van left the paved surface of the highway. He suggested that the elevation of the highway and the crown of the surface of the roadway made it impossible to observe the surface of the highway, the lane markings on the highway, the adjoining paved shoulder, or the

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[4] "Tripping" occurs when a moving vehicle hits an obstruction at some steering angle. The obstruction may consist of such barriers as a rut in the dirt, a mound of gravel thrown up by the action of the wheels while sliding sideways, or the abrupt elevation of the asphalt pavement over the adjoining ground surface of the road shoulder.

adjoining gravel shoulder. The Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses, but contended nevertheless that Mr. Fitzgerald and Mr. Jardee could have determined in which lane the van was traveling.

VW also presented the testimony of Dr. John Habberstad who purported to reconstruct what happened during the accident. In developing his accident reconstruction, Dr. Habberstad relied on the notes of John Ferguson, a Texas trooper who investigated the accident, and on photographs taken by Raymond Gesch, the Chief of Police for Sonora, Texas. Dr. Habberstad's reconstruction supported VW's theory of the accident.

The Roy's, in turn, challenged the validity of Dr. Habberstad's reconstruction. They cited Dr. Habberstad's testimony that he considered only that evidence supporting his theory and ignored that which did not. They further noted that Trooper Ferguson's testimony at trial was substantially different from his deposition testimony where he stated, "I believe [the van] began to overturn on the white shoulder stripe which divides the improved shoulder with the main traveled portion of the roadway." He did not change his opinion to conclude that the van rolled while on the unimproved shoulder until after conferring with Dr. Habberstad.

In addition, the parties disputed the cause of the fire. VW's experts testified that the van's fuel system was well-designed, that Mr. Roy's repairs caused the fire, and that there would have been no fire had the gas cap been in place. The Roy's experts concluded that the van's tap valve was susceptible to clogging, that Mr. Roy's actions

were a good temporary repair, and that the fire would have occurred even with the gas cap in place. Again, both sides presented significant evidence to support their theories.

3. The Role of Sympathy in the Jury Verdict

The district court also based its granting of a new trial on its perception that the jurors were swayed by emotion and sympathy for Doug Roy III. It pointed to no evidence, however, to support this ruling. Certainly a jury presented with a case like this one, involving horrible burn injuries to a child, will be likely to feel great sympathy. The question, however, is whether the jury was able to put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated. There is no evidence that the jury here did otherwise. The district court repeatedly instructed the jury that sympathy could play no role in their deliberations. Moreover, the damages awarded were consistent with the amount the experts estimated would be required to compensate the Roys for their injuries and treatment. Punitive damages were denied. In light of the conflicting evidence, the verdict for the Roys does not necessarily indicate that the jury's decision was born of sympathy.

VW presented weighty evidence to the jury to counter the Roys' claims that a defect in the design of the VW van was the primary cause of the Roys' injuries. Nevertheless, the Roys' also strongly supported their claims. "[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence

and inferences, and determine the credibility of witnesses." *Boeing Company v. Shipman*, 411 F.2d 365, 375 (5th Cir.1969) (en banc). Although under the evidence the jury could have concluded that the van was not defective, or that the defect was not a proximate cause of the accident, this possibility does not warrant granting a new trial. The evidence in this case was substantially balanced. VW's evidence did not so preponderate that it fell within the discretion of the trial judge to rule that the jury's verdict was against the great weight of the evidence.

Conclusion

The District Court abused its discretion in setting aside the jury verdict in the first trial and ordering a new trial. We therefore reinstate the jury verdict in the first trial in favor of the Roys. In light of our ruling, it will not be necessary to address any of the errors alleged to have occurred in the second trial.

REVERSED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG ROY, JR., MARSHA ROY; SHANNON ROY, a minor, by and through her guardian Ad Litem, DOUG ROY, JR.; DOUG ROY, III, a minor, by and through his guardian Ad Litem, DOUG ROY, JR., *Plaintiffs-Appellants,* v. VOLKSWAGEN OF AMERICA, INC.; VOLKSWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, *Defendants-Appellees.*	No. 87-6340 D.C. No. CV-83-5254-SVW ORDER AMENDING OPINION

Filed December 17, 1990

Before: Procter Hug, Jr. and William C. Canby, Jr., Circuit Judges and David A. Ezra,* District Judge.

ORDER

The opinion previously filed in this case and reported at 896 F.2d 1174, is amended as follows:

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

At 896 F.2d at 1175, right column, line 5:

Delete "the Roys' motion" and substitute "VW's motion."

At 896 F.2d at 1179, left column, lines 22-28:

Delete quotation from, and citation of *Boeing Company v. Shipman*. Substitute the following,

"The district court's authority to order a new trial is admittedly less constrained than its authority to enter a judgment contrary to the jury's verdict. However, the district court may order a new trial only if it finds that the jury's verdict was 'clearly contrary to the weight of the evidence.' *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412, 1420 (9th Cir. 1989) (quoting *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981))."

At 896 F.2d at 1179, left column, line 38:

At the end of the paragraph, add:

"*See id.*[5]".

Then add a new Footnote 5 as follows:

[5]VW contends that this case is controlled by *Air-Sea Forwarders, Inc. v. Air Asia, Ltd.*, 880 F.2d 176 (9th Cir. 1989). However, our case is not a case where the district judge's grant of a new trial was based upon the lack of credibility of the plaintiffs' crucial witnesses. In *Air-Sea Forwarders*, we noted that the plaintiffs' evidence on the issue in question was based almost exclusively on two witnesses. The district court found these two witnesses to be incredible because of their prior inconsistent statements. In the

action before us, it is true that the plaintiffs' case was based in part upon the testimony of two eyewitnesses, and that the trial judge stated that the "accuracy" of their testimony was "open to question," not because of prior inconsistent statements or demeanors suggesting untruthfulness, but because of the distance from which they observed the accident. We construe the trial judge's comment as going to the weight of the eyewitnesses' testimony, rather than to their truthfulness as witnesses. Moreover, there was considerable other evidence supporting the plaintiffs' contentions. The judge did not grant the new trial on grounds of credibility, as in *Air-Sea Forwarders*, but rather on what he perceived to be the great weight of the evidence in general. The district judge stated:

> I think one must conclude from the great weight of the evidence in this case that the design of the Volkswagen van was not defective and that, in any event, the roll over here under the circumstances herein-above outlined was not the result of a defective design.

Roy v. Volkswagenwerk Aktiengesellschaft, 600 F. Supp.at 655.

With that amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and of the above amendment and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.